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No. 526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

THE F. & M. SCHAEFER BREWING CO.,
Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

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IN THE

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THE F. & M. SCHAEFER BREWING CO.,

Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

Appellant appeals from the final order and judgment and remittitur of the Court of Appeals of the State of New York, entered on June 25, 1958, affirming the order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, which confirmed a determination of the Comptroller of the City of New York assessing additional New York City business taxes against appellant for the years 1948 through 1951, both inclusive.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A, *infra*, p. 13) is reported at 4 N. Y. 2d 423. The order of the Appellate Division, rendered without opinion, is reported at 3 App. Div. 2d 898.

Jurisdiction

This is a proceeding pursuant to Article 78 of the New York Civil Practice Act to review a final determination of the Comptroller of the City of New York that there is due from the appellant and payable to the City of New York a deficiency of business tax under the Administrative Code of the City of New York for the years 1948 through 1951, both inclusive. Appellant sought review of said determination on the ground that the New York City law imposing the tax for the privilege of doing business as applied to the unapportioned gross receipts of appellant from sales to out-of-state customers infringed the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). The judgment of the New York State Court of Appeals affirmed a final order of the Appellate Division which confirmed the Comptroller's determination and upheld the validity of the New York law as thus applied. The judgment of the Court of Appeals of the State of New York from which this appeal is taken was dated and entered June 25, 1958 (Appendix A, *infra*, p. 18) and is final. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). The notice of appeal was filed in the Supreme Court of the State of New York, New York County, on September 22, 1958.

Jurisdiction of this appeal is conferred on this Court by 28 U. S. C. § 1257(2). Cases sustaining the jurisdiction of this Court on such appeal include *West Point Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389 (1952); *Freeman* v.

Hewit, 329 U. S. 249 (1946); *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946); *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938).

Statutes

The statutes, the validity of which is drawn in question on the ground of being repugnant to the Commerce Clause of the Constitution of the United States, are § 24-a of the New York State General City Law (McKinney's Cons. Laws of New York, Book 20, General City Law, Article 2-B, § 24-a, L. 1941, Ch. 199, § 1, as amended) and § B46-2.0 of the New York City Administrative Code, as amended by Local Law No. 44 of 1948, Local Law No. 72 of 1950, Local Law No. 76 of 1952. These statutes and the regulations are set forth in pertinent part in Appendix B, *infra*, pp. 21-23.

Question Presented

Whether the Commerce Clause of the Constitution is infringed by a New York City law imposing a tax held, first, to be on the privilege of doing business measured by gross receipts of the business and, later, held to be on a local event separate from commerce as applied to a local manufacturer and measured by the unapportioned gross receipts from sales to out-of-state customers delivered within the state for immediate interstate transportation.

STATEMENT OF THE CASE

Facts

Appellant, The F. & M. Schaefer Brewing Co., a New York corporation, was at all times here in question engaged in the business of brewing and selling beer. Appellant's brewery was located in Brooklyn, New York, and it delivered beer in its own trucks to retail customers in New York City and the metropolitan area, including points in New Jersey. Appellant also sold beer outside the metro-

politan area and outside the State of New York to wholesale distributors who had been selected as sole distributors of its products in the territory assigned. Only sales to such wholesale distributors located outside the State of New York are involved in this proceeding. Such distributors were licensed to deal in beer in the states outside the State of New York where they did business but they were not licensed to deal in beer in the State of New York.

All sales to these out-of-state distributors were handled by appellant in the same manner. Initially an order was transmitted by mail or telephone by the distributor from his place of business outside New York State to appellant's brewery in Brooklyn specifying the quantities of draught or packaged beer and the date it was desired. On the basis of the order appellant checked the distributor's credit and prepared a delivery ticket on which was set forth the name and address of the distributor, the name of the trucker which was to transport the beer, and the types and quantities of beer desired.

On the day the beer was to be picked up, a truck arrived at appellant's brewery at 430 Kent Avenue, Brooklyn, New York, and the driver presented a written "pickup order" signed by the distributor as is required by the New York State Alcoholic Beverage Control Law, covering the order previously phoned or mailed in. The truck was loaded and checked by appellant's employees and the delivery ticket was signed by the driver of the truck and the employee of appellant who had checked the loading. The truck was then sealed by appellant's employees, and the truck left the brewery with the sealed load of beer for transportation directly to the place of business of the distributor outside the State of New York.

From the delivery ticket appellant prepared an invoice which was mailed to the distributor.

All of the truckers transporting the beer from appellant's brewery to the distributors were selected and ar-

ranged for by the distributors. The truckers were of three classes:

(1) *Common Carriers.* Truckers who operated motor vehicles as common carriers under certificates granted by the Interstate Commerce Commission.

(2) *Contract Carriers.* Truckers who operated motor vehicles as contract carriers under permits granted by the Interstate Commerce Commission and had contracts with the distributors for whom they transported beer.

(3) *Distributors' Own Trucks.* Trucks which were owned or leased and operated by the distributors themselves.

All trucks of all three classes were registered with the New York State Liquor Authority and had permits to transport alcoholic beverages in the State of New York. None of the distributors or truckers was licensed to sell alcoholic beverages in the State of New York.

Appellant reported on its New York City business tax returns for the privilege periods beginning July 1, 1948, 1949, 1950 and 1951, the receipts from all sales to customers outside the State of New York during the calendar years 1948 through 1951 (whether transported by appellant's own trucks or by trucks sent to the brewery by the customer) as receipts from interstate commerce which were allocable according to the formula prescribed by the regulations. Appellant paid the tax measured by the portion of such receipts allocated to business in the City of New York.

The appellee, Comptroller, determined on audit that the receipts from sales to out-of-state customers transported by appellant's trucks were from interstate commerce and allocable but that receipts from all of appellant's sales to out-of-state distributors which were transported by common carrier, contract carrier or distributors' own trucks which were sent to and called at appellant's brewery in Brooklyn were receipts from intrastate business and includible in the

measure of the tax without apportionment. On this basis Comptroller determined a deficiency of business tax with penalty and interest of $43,796.10. After formal hearings the Comptroller finally determined that only those receipts from sales to out-of-state distributors as were transported by common carrier trucks were in interstate commerce and allocable and that receipts from sales where the beer was transported by contract carriers or distributors' trucks were intrastate and were used in their entirety without allocation or apportionment in calculating the deficiency of tax.

Appellant's business of selling to its out-of-state customers, beer which was transported by whatever means across state lines and imported into other states, constituted interstate commerce. *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290 (1921); *Furst* v. *Brewster*, 282 U. S. 493 (1931); *Swift & Co.* v. *United States*, 196 U. S. 375 (1905); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (1885); *Kelley* v. *Rhoads*, 188 U. S. 1 (1903); *United States* v. *Simpson*, 252 U. S. 465 (1920); *Richfield Oil Corp.* v. *State Board*, *supra*.

Raising Federal Question Below

At the formal hearings before the Referee appointed by the Comptroller, appellant asserted its right to have receipts from sales to out-of-state customers treated as receipts from interstate commerce and apportioned in calculating the tax and contended that the failure to apportion the receipts from such interstate shipments, whether by common carrier, contract carrier or distributor's own truck, was in violation of the Commerce Clause of the Constitution of the United States. In its petition to the Supreme Court of the State of New York for review of the Comptroller's determination, pursuant to provisions of Article 78 of the Civil Practice Act, appellant averred that the deficiency of

tax determined on the unallocated receipts from sales in interstate commerce was in violation of the Commerce Clause of the Constitution of the United States. Also, in their briefs before the Appellate Division and the Court of Appeals of the State of New York both appellant and appellee argued the issue under the Commerce Clause of the Constitution of the United States. Both the Appellate Division and the Court of Appeals rejected this contention and upheld the validity of the tax. The Court of Appeals' opinion (Appendix A, *infra*, p. 13) clearly demonstrates that it passed upon the issue under the Commerce Clause of the Federal Constitution in reaching its decision upholding the validity of the law and the tax. *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928).

The Federal Questions are Substantial

State taxation of interstate commerce or its gross receipts unhampered by the Commerce Clause would permit a multiple burden on that commerce which has been held to be ground for its invalidation. Taxes on the privilege of doing interstate commerce, like taxes aimed at or which discriminate against it have been described as forbidden regulations. However, where a local incident separated from the commerce is selected as the taxable event that has been held to be a permissible levy. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 429 (1947). The validity of a state tax against the challenge that it infringes the Commerce Clause of the Constitution depends first of all upon the nature of the tax—what it is that the state has sought to tax—the all-important operating incidence of the tax *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).

With privilege taxes, the scope of the privilege which is taxed is significant, whether it be a privilege of a purely local nature, *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), or a privilege of conducting the entire operations of business, *Fisher's Blend Station* v. *Tax Commission*, 297

U. S. 650 (1936). The decisions of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), on which the Court of Appeals relied, dealt with an Indiana tax which was held to be "a privilege tax upon the receipt of gross income," *Adams Mfg. Co.* v. *Storen, supra*, a local transaction separate from interstate commerce.

One type of tax may be unconstitutional and another type not, in a particular factual situation. *New Jersey Ins. Co.* v. *Div. of Tax Appeals*, 338 U. S. 665 (1950); *Werner Machine Co.* v. *Director of Div. of Taxation*, 350 U. S. 492 (1956); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944); *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335 (1944).

Contrary to the principles laid down by the above decisions of this Court, the Court of Appeals here held that appellant's contention "that the *Wood* and *Harvester* cases are not applicable because they deal with a different type of tax is without merit." (Appendix A, *infra*, p. 16.) Although the court recognized that the validity of a tax under the Commerce Clause should be determined by its practical operation and effect rather than descriptive labels, it found similarity between the Indiana and New York City laws merely in the words employed. It failed to find and distinguish the different privileges which each made the subject of the tax.

The Court of Appeals held "here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event." In other words, the New York City business tax is imposed on a local transaction separated from commerce. This holding of the Court of Appeals is in conflict with its previous decisions in which it was held that the New York City business tax is "a tax for the privilege of doing business within the City of New York. It is not an income tax, an ad valorem property tax nor is it a tax in lieu of other taxes for the use of facilities within the

City." *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48 (1953), *aff'd no opinion*, 307 N. Y. 762 (1954); *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, *aff'd without opinion*, 307 N. Y. 780 (1954), *cert. denied*, 348 U. S. 916 (1955). The Court of Appeals decision is also in conflict with the decision of this Court in *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422 (1947), *affirming* 294 N. Y. 906. In *Carter & Weekes* this Court distinguished this New York City tax from those taxes where the taxable event was a local activity or incident disjoined from commerce. Among the cases distinguished by this Court was the decision in *Wood Preserving* on which the Court of Appeals here relied. This Court treated this New York City tax as a tax on the privilege of doing business which could not be validly imposed on a stevedoring company engaged exclusively in interstate commerce.

The incidence of the tax, the subject of the tax or the event or activity upon which the liability for the tax is conditioned, referred to in decisions of this Court, is fixed by the legislature and does not vary from case to case. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587-8 (1937).

The method of statutory construction apparently employed by the Court of Appeals is novel in that the subject or incidence of the tax is varied from case to case to avoid conflict with the Federal Constitution. In *Carter & Weekes, supra; United Air Lines, supra;* and *United Piece Dye Works, supra,* this New York City tax was held to be a tax upon the privilege of doing business, a type of tax held to be a forbidden regulation as applied to interstate commerce. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 48 (1940). In *Matter of New Yorker Magazine* v. *Gerosa*, 3 N. Y. 2d 362 (1957), appeal dismissed, 356 U. S. 399, the same tax was held to be a tax "on the New York sale of its advertising," considered a separable part of the total method of doing business and therefore not an encroachment on the free trade area protected by the Commerce Clause,

and it was held that this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), was controlling. In *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302 (1958), the same New York City tax was held to be merely a general tax which did not regulate, restrain or interfere with the freedom of the press. In this case the Court of Appeals held (Appendix A, *infra*, pp. 15-16) "*Department of Treasury* v. *Wood Corp.* (313 U. S. 62) and *Harvester Co.* v. *Department of Treasury* (322 U. S. 340) are indistinguishable from the case before us. * * * Here, too, the taxpayer delivered the goods sold to the purchaser within the taxing jurisdiction and it was the purchaser who transported them to another state; here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event." Therefore the tax did not infringe the Commerce Clause.

In the case at bar the Court of Appeals appears not to have been concerned by its earlier decisions as to the nature of this tax in *Carter & Weekes, supra; United Air Lines, supra;* and *United Piece Dye Works, supra*, cited to it by appellant, nor to have considered reversal or distinction thereof. Appellant's argument based on these earlier decisions was summarily disposed of as "neither meaningful nor consequential." The New York City law here in question cannot, it is submitted, reasonably be interpreted in one case to impose a tax on business, the entire operations including commerce and, in another case, a tax limited to a local event disjoined from commerce.

The effect of the decision of the Court of Appeals of the State of New York in this case contains a threat to the freedom from regulation of interstate commerce in New York City, one of the greatest commercial and transport centers in the world, far beyond the significance of the tax involved in this case. It amounts practically to a repeal of the Commerce Clause of the Constitution. This decision and the

other decisions of the Court of Appeals cited above stand for the proposition that if a statute imposing one kind of tax could under the Commerce Clause or other clauses of the Constitution be validly imposed under certain circumstances, then another statute imposing a different kind of tax would be valid under similar circumstances as long as there is a certain similarity in the words used in the two statutes.

Since a Federal right under the Commerce Clause is involved, this Court should review and itself determine the true nature and effect of this New York City tax which by the terms of the law and the regulations and prior decisions is a tax on the privilege of doing business. *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954); *Society for Savings* v. *Bowers*, 349 U. S. 143 (1955); *New Jersey Ins. Co.* v. *Div. of Tax Appeals, supra.* As here applied to the unapportioned gross receipts of sales to customers in states outside New York, the New York City General Business Tax Law subjects such interstate commerce to the danger of multiple taxation and regulates such commerce in violation of the Commerce Clause of the Federal Constitution. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939); *McGoldrick* v. *Berwind-White Co., supra.* Any of the states in which appellant's distributors were located and to which its commerce extended could without too much difficulty find a local event or activity upon which to levy a similar tax.

This Court now has before it the *Minnesota* v. *Northwestern States Portland Cement Co.*, Docket No. 12, October 1958, Term, 250 Minn. 32, 84 N. W. 2d 373, and *Stockham Valves & Fittings, Inc.* v. *Williams*, Docket No. 33, 101 S. E. 2d 197, cases which involve the effect under the Commerce Clause of the Constitution of state taxes imposed on net income as distinguished from a tax on the privilege of doing business measured by net income. We urge that this Court take jurisdiction in the case at bar and permit appellant to have the benefit of this Court's disposition of those cases.

Conclusion

It is respectfully submitted that the decision below is in conflict with decisions of this Court; that the Federal questions presented are substantial and require plenary consideration by this Court.

Respectfully submitted,

RUSSELL D. MORRILL,
Attorney for Appellant.

FRANCIS L. CASEY,
Of Counsel.

November 1958.

APPENDIX A

1. Opinion of the Court of Appeals

In the Matter of

F. & M. SCHAEFER BREWING COMPANY,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent.

Decided June 25, 1958.

FULD, J. Whether the City of New York may tax receipts from sales by a local concern to its out-of-state customers where delivery of the goods sold was made in New York, is the question for decision.

The taxpayer, the F. & M. Schaefer Brewing Company, is a domestic corporation engaged in operating a brewery in Brooklyn. It sells its beer to retailers in the metropolitan area and also to wholesale distributors in New York and in neighboring states. Each of these distributors is an independent business organization, selling Schaefer beer as well as the products of other breweries.

The sales, made to the out-of-state distributors (located in New England, Pennsylvania and New Jersey), were handled exactly as were those made to customers doing business in New York. The customer's truck would be loaded at the brewery in Brooklyn with the beer ordered and, after the load had been checked by the driver and a

Schaefer employee, the truck would be "sealed" and driven to the distributor's place of business.

The trucking arrangements entered into by the different distributors varied; some owned their own trucks or leased them, while others used contract motor carriers or utilized motor vehicle common carriers. Whatever the arrangement, however, the trucker taking delivery of the beer was selected by the distributor and had no connection with the brewery. No employee or representative of Schaefer handled the beer, or accompanied it, once it left the brewery and it assumed no responsibility for the beer from that time on.

On its New York City business tax return—imposed on gross "receipts" for "the privilege of carrying on * * * business" within the city (Administrative Code of City of New York, § B46-2.0, subd. a)—Schaefer reported its sales to out-of-state distributors as receipts from interstate commerce and based the tax paid solely on revenue derived from sales to those of its customers doing business in New York. The Comptroller of the City of New York, however, ruled that, since the customer took delivery in the city, the transaction was local and intrastate and the moneys received taxable. Including these receipts in computing the amount of tax due, the Comptroller assessed a deficiency for the taxable years 1948 through 1951 of over $43,000, which Schaefer paid under protest.

Following formal hearings, the Comptroller, deciding that the tax should be imposed upon all receipts, including those from sales to distributors doing business in other states, except where delivery for the out-of-state customer was made to a common carrier (Business Tax Regulations, art. 209; Rules and Regulations of New York City Agencies, 1938-1946, pp. 77-78), issued a "final determination" resulting in a refund of some $7,300. The Appellate Division unanimously confirmed that determination and the taxpayer, urging that the tax constituted "a discriminatory

burden on interstate commerce" in violation of the Commerce Clause of the Federal Constitution, appeals to this court as of right.

A sale of goods in which delivery is taken by the purchaser within the seller's state is a local transaction which is taxable; "neither the Commerce Clause nor the Fourteenth Amendment", the Supreme Court has said, "prevents the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes." (*Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 344, 345-346; see, also, *Department of Treasury* v. *Wood Corp.*, 313 U. S. 62, 67-68; *Indiana Dept. of State Revenue* v. *Bendix Aviation Corp.*, 237 Ind. 98, appeal dismissed 355 U. S. 607.) And it is immaterial "that the goods are to be transported out of [the taxing state] immediately on delivery", for the "consummation of the transaction was an event within [the taxing state] which gave it authority to levy the tax on the gross receipts from the sales" (322 U S. 345, 348).

Department of Treasury v. *Wood Corp.* (313 U. S. 62) and *Harvester Co.* v. *Department of Treasury* (322 U. S. 340) are indistinguishable from the case before us. In the first, a company, incorporated in Delaware and having its principal place of business in Pennsylvania, contracted to sell a quantity of railroad ties to the Baltimore & Ohio Railroad. The ties, produced by an Indiana manufacturer, were delivered to the railroad on board its cars in Indiana for shipment out of the state. Marking as significant the facts showing the completed delivery to the railroad company in Indiana, the Supreme Court declared that that state, "in taxing the receipts from these local transactions", did not exceed "its constitutional authority by taxing interstate commerce or discriminating against it" (*Department of Treasury* v. *Wood Corp.*, 313 U. S., at p. 68). And in the *Harvester* case, "sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to

Indiana, takes delivery there and transports the goods to another State" were held subject to the Indiana "tax upon the receipt of gross income" (322 U. S., at p. 345). Here, too, the taxpayer delivered the goods sold to the purchaser within the taxing jurisdiction and it was the purchaser who transported them to another state; here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event.

The petitioner's contention that the *Wood* and *Harvester* cases are not applicable because they deal with a different type of tax is without merit. In purpose and in language, the similarity between the Indiana tax there involved and the New York City tax with which we are concerned could hardly be more complete. The Indiana statute, upheld by the Supreme Court in the *Wood* and *Harvester* cases, imposes a tax upon "the gross receipts • • • received from trades, businesses, or commerce" (Indiana Stat. Ann. [Burns, 1951, Vol. 11, pt. 2], § 64-2601, subd. [m]) and the New York City law, closely resembling the other, imposes a tax upon "all receipts received • • • from • • • trade, business or commercial activity" (Administrative Code, § B46-2.0, subd. a). That the latter measure is further described as a tax on "the privilege of carrying on business"—the sole prop for the petitioner's point—is neither meaningful nor consequential. As a matter of fact, both the Supreme Court of the United States and the Indiana Supreme Court have also denominated the Indiana tax "a privilege tax" (*Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345, *supra*; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Miles* v. *Department of Treasury*, 209 Ind. 172, 188, appeal dismissed 298 U. S. 640), a clear indication that the validity of a tax, or of the statute imposing one, depends on substance, not labels.

The argument that the present tax has been improperly treated as a "sales tax" rather than a "privilege tax," is purely superficial. New York City's power to tax the

receipts received from these transactions is certainly not affected by the name ascribed to the tax. (See *Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345-346, *supra;* see, also, Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 929-930.) "Indeed," wrote the Supreme Court in the *Harvester Co.* case, "if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363), we must acknowledge that the [New York City] sales tax sustained in the *Berwind-White* case [309 U. S. 33] 'was, in form, imposed upon the gross receipts from an interstate sale' " and that " 'local activities or privileges' • • • are as adequate to support [the Indiana gross receipts] tax as they would be to support a sales tax" (322 U. S., at pp. 346, 349).

The order appealed from should be affirmed, with costs.

Chief Judge Conway and Judges Desmond, Dye, Froessel, Van Voorhis and Burke concur.

Order affirmed.

2. Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of June in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, Presiding

RAYMOND J. CANNON, Clerk

REMITTITUR June 25, 1958.

2. Judgment of the Court of Appeals

No. 107

In the Matter of the Application of the F. & M. Schaefer Brewing Company,

Appellant,

vs.

Lawrence E. Gerosa, as Comptroller of the City of New York,

Respondent,

for an Order &c.

Be It Remembered, That on the 26th day of March in the year of our Lord one thousand nine hundred and fifty-eight, The F. & M. Schaefer Brewing Company, the appellant—in this cause, came here unto the Court of Appeals, by White & Case, its attorneys, and filed in the Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Francis L. Casey, of counsel for the appellant—, and by Mr. Morris L. Heath, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Di-

vision of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York

COURT OF APPEALS, CLERK'S OFFICE,

Albany, June 25, 1958.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk:

APPENDIX B

Statutes and Regulations Involved

General City Law, Article 2-B—General Business and Financial Tax Authorization

"§ 24-a. Certain cities authorized to impose taxes on certain businesses

"Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city, * * *. Every such local law in terms shall be, substantially, as follows:"

* * *

"§ 2. *Imposition of tax.*—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, * * *.

New York City Administrative Code, as amended by Local Laws No. 44 of 1948, Local Laws No. 72 of 1950 and Local Laws No. 76 of 1952.

"§ B46-2.0. *Imposition of tax.*—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial

business, or of making sales within such city, for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence, * * *.

* * *

Rules and Regulations of New York City Agencies, 1938-1946, pp. 60-61, 62, 77-78.

Rules and Regulations Relating to the General Business and Financial Tax

"Article 101.—The General Business and Financial Tax (commonly called the 'Business Tax' or 'Gross Receipts Tax') has been in effect since May 22, 1934, by virtue of local laws enacted from year to year. The tax is imposed for the *privilege* of carrying on or exercising for gain or profit within the City of New York any trade, business, profession, vocation or commercial activity, or of making sales * * * within such city, during a specific 'privilege period,' or any part thereof, and is based upon the gross receipts * * * for a specified 'basic period' as set forth in the respective local laws."

* * *

"Article 104.—The General Business and Financial Tax is imposed for the privilege of conducting business or any professional or commercial activity within the City of New York during a specific privilege period, or any part thereof. Under the current local law (and many of the preceding ones), the privilege period commences on July 1st of the calendar year and ends on the following June 30th.

"The tax for any particular privilege period is computed upon the gross receipts * * *. The levy is imposed for the privilege of doing business during the privilege period, or any part thereof, and the

gross receipts or gross income for the basic period, as the case may be, are used as the means of computing the amount of tax due thereunder."

• • •

"Article 209.—Receipts from transactions involving interstate commerce are not exempt from tax but are to be included in its measure either in their entirety or upon an allocated basis as provided in subsequent articles of these regulations.

"Transactions will be deemed to involve interstate commerce only when they directly involve the sale, exchange or transportation of commodities between the states; the transportation of passengers between the states; or the transmission of intelligence or communications between the states. The citizenship or residence of the parties to the transaction is of no significance. Where a sales transaction is involved, it is of no importance in which state title to the goods passes or whether the goods are shipped f.o.b. one state or another.

"Interstate commerce is not deemed to be involved in sales made by a New York City vendor to customers located outside the State of New York where the property is delivered directly to the purchaser or his agent within the State of New York, notwithstanding the fact that the purchaser or his agent intends to, and later does, transport the property to a point outside the State. However, such sales will be considered as having been made in interstate commerce when the New York City vendor, as a necessary incident to the contract of sale, agrees to, and does, deliver the goods to the purchaser at a point outside the State of New York, or delivers the goods to a common carrier consigned to the purchaser at a point outside the State."